IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK S. PALMISANO	:	CIVIL ACTION
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	:	
v.	:	
	:	
	:	
ELECTROLUX LLC, f/k/a	:	
ELECTROLUX CORP.	:	NO. 99-426

O'Neill, J. August , 2000

MEMORANDUM

Plaintiff Patrick S. Palmisano filed this action against his former employer Electrolux LLC ("Electrolux") alleging unlawful disability and age discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. He also alleges that Electrolux unlawfully retaliated against him for filing charges with the Equal Employment Opportunity Commision ("EEOC") in violation of both the ADA and the ADEA.

I have subject matter jurisdiction over Palmisano's claims pursuant to 28 U.S.C. § 1331. Presently before me are Electrolux's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Palmisano's response thereto. Electrolux contends that summary judgment is appropriate because Palmisano: (1) is not "disabled" within the meaning of the ADA; (2) has failed to produce sufficient evidence of age discrimination under the ADEA; and (3) has failed to produce sufficient evidence to establish a prima facie case of retaliation.

I.

Palmisano began working for Electrolux on December 8, 1967 at the age of thirty. Pl.'s Aff. at ¶ 1-2. From 1967-1973, Palmisano worked as a sales representative and consistently performed within the top one percent of the company salesforce. Pl.'s Aff. at ¶ 2-3. In 1973, Palmisano was promoted to branch manager of the Jersey City, New Jersey office where he remained for four years. Pl.'s Dep. of Sept. 17, 1999 at 48-49 (hereinafter "Pl.'s Dep. I"). Thereafter, Palmisano went on to hold branch manager positions in several other offices and a division manager position encompassing five Philadelphia area offices and one Delaware office. Id. at 50-76. In 1992, Palmisano received the branch manager position in Allentown, Pennsylvania. Id. at 77-80. The Allentown branch manager position was a valuable assignment because the office historically grossed one million dollars a year in sales which gave the branch manager the potential to earn a six figure income. Pl.'s Aff. at ¶ 11; Vastardis Dep. at 9.

When Palmisano was fifty-seven years of age, he injured himself at work on September 6, 1995. Pl.'s Aff., Ex. 2. Due to this work-related injury, Palmisano had to take a medical leave of absence from October 5, 1995 to February 5, 1996. Id. at ¶ 30. To avoid further injury, Palmisano was instructed by Dr. Richard Hodosh not to lift more than twenty-five pounds at one time or to drive over fifteen miles without a break. Id., Ex. 4. Palmisano remains under these restrictions. Pl.'s Dep. I at 13.

At the start of Palmisano's leave, Dwight Musselman, who was thirty-two years of age, assumed Palmisano's responsibilities as branch manager. Musselman Dep. at 5. Musselman was Palmisano's supervisor and division manager of the division encompassing Allentown. Id. at 32.

In December 1995 the branch manager responsibilities were passed on to Anthony Costantino

who was thirty-four. Constantino Dep. at 7. During this time Palmisano telephoned the area vice president, Richard Luisi, three to five times requesting that he be returned to his former position in Allentown. Pl.'s Dep. of October 25, 1999 at 36-37 (hereinafter "Pl.'s Dep. II"). Luisi offered Palmisano a position in New Jersey and Palmisano accepted a branch manager position in Denville, New Jersey. Id. at 38. Palmisano made clear he only wanted the Denville branch manager position until such time as he could be reinstated in Allentown. Id. at 37.

In February 1997, Palmisano wrote Luisi a letter requesting that he be reinstated as Allentown branch manager. Pl.'s Aff., Ex. 8. In March and April of 1997, Palmisano wrote two letters to Charles A. Malone, vice president of human resources, also requesting that he be returned to his former position as Allentown branch manager. Id., Ex. 9, 11.

In March 1997, Richard Ferris, a sales manager in his late twenties to early thirties assumed the duties of Allentown branch manager. Constantino Dep. at 54. Shortly thereafter, in May 1997 Michael Ellis, age forty, assumed the responsibilities of branch manager. Ellis Dep. at 5.

After four or five months as Denville branch manager, Electrolux removed Palmisano from this position. Pl.'s Dep. II at 44. Electrolux offered Palmisano at least two other branch manager positions, but Palmisano chose to take a demotion and work as a sales representative in Springfield, New Jersey. Pl.'s Dep. II at 48-51. Sales representatives were required to meet certain earning requirements to maintain insurance coverage under the Electrolux Group Medical Plan. Pl.'s Dep. II at 60-63. Palmisano was aware of these requirements. When Palmisano did not meet the earnings requirement for the last quarter of 1997, he was removed from the group policy effective January 31, 1998. Pl.'s Aff., Ex. 11.

Palmisano sent a letter dated April 9, 1998 to the chief executive officer Thomas Albani

requesting his former position as Allentown branch manager. Id., Ex. 15. After discovering Joseph Urso had replaced Albani as chief executive officer, Palmisano sent another letter again requesting that he be returned to the position of Allentown branch manager. Id., Ex. 19. In addition, Palmisano's attorney, Richard J. Orloski, sent a letter to Electrolux's general counsel Steve Cooper requesting that Palmisano be reinstated as Allentown branch manager. Id., Ex. 21.

In a letter to Urso dated May 12, 1998, Palmisano requested that if he could not be reinstated as Allentown branch manager that Electrolux terminate his employment. Pl.'s Aff., Ex. 19. Electrolux terminated Palmisano's employment on June 30, 1998.

Since leaving Electrolux, Palmisano has worked as a sales representative for Financial Network, Weichert Realtors, Mark Four Enterprises, Terminix Commercial, and Oreck. Pl.'s Dep. I at 5-6, 28-29; Pl.'s Dep. II at 5.

II.

Summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, a court's responsibility is not to resolve disputed issues of fact but to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). The moving party bears the initial burden of identifying those portions of the record which it believes indicate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party must then point to specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). It must raise "more than a mere scintilla of evidence in its favor" to defeat the summary judgment motion; it must produce evidence on which a jury could reasonably find for the non-moving party. Anderson, 477 U.S. at 251. Though the non-moving

party may not rely upon unsupported allegations or mere suspicions, id. at 248, it is entitled to have all reasonable inferences drawn in its favor. Id. at 255.

III.

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under the ADA, an individual is defined as disabled if he has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). Palmisano alleges that he is disabled under all three definitions of the term "disability."

I will first examine whether Palmisano has a physical or mental impairment that substantially limits one or more of the major life activities. Here, Palmisano alleges that he is substantially limited in the major life activity of working. According to the regulations promulgated by the EEOC, an individual is substantially limited in his ability to work if he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). "[T]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); see also Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133, 2138 (1999).

As evidence of his physical impairment, Palmisano points to Dr. Hodosh's warning not to lift over twenty-five pounds at one time and not to drive over fifteen miles without rest. Pl.'s Aff.,

Ex. 4. However, numerous court have held that a moderate lifting restriction of twenty-five pounds does not act as a significant limitation on an individual's ability to work or to perform any other major life activity. See Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996); see also Morrone v. UGI Utilities, Inc., No. CIV.A.99-36, 2000 WL 92341 (E.D. Pa. 2000). Moreover, no reasonable jury could find that Palmisano's fifteen mile driving restriction is a substantial limitation on his ability to work. See Sinkler v. Midwest Property Management Limited Partnership, 209 F.3d 678 (7th Cir. 2000) (holding that a phobia which restricted a saleswomen from driving in new or unfamiliar areas did not substantially limit her major life activity of working). Palmisano provides no evidence as to how a fifteen-mile driving restriction would limit him from an entire class or broad range of jobs. Since leaving Electrolux, Palmisano has been able to utilize his training, knowledge, skills, and abilities to obtain five different sales positions within fifteen miles of his Florham residence and which do not require lifting over twenty-five pounds. Pl.'s Dep. I at 5-6, 28-29; Pl.'s Dep. II at 5.

Likewise, Palmisano fails to offer sufficient evidence that he has a record of impairment. A record of impairment means that an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). As Palmisano's impairments do not substantially limit a major life activity, a history of these same impairments cannot constitute a record of impairment. Palmisano does not put forth evidence or even contend that he has been misclassified as having some other impairment.

Finally, Palmisano has not offered any evidence that he was viewed as suffering from a substantial impairment. To the contrary, the fact that Electrolux permitted Palmisano to work as an

outside sales representative suggests that Electrolux did not view Palmisano as suffering from such an impairment. Since I find that Palmisano has failed to provide evidence that he is "disabled" within the meaning of the ADA, I will grant judgment for Electrolux on the ADA discrimination claim.

IV.

The ADEA makes it "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). Courts apply the evidentiary framework first laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to ADEA claims. See Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996). Under that framework Palmisano must first establish a prima facie case of age discrimination by providing evidence that: "(1) [he] was over 40 at the time [he] applied for the position in question; (2) [he] was qualified for the position in question; (3) despite [his] qualifications [he] was rejected; and (4) the employer ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination." Narin v. Lower Merion School District, 206 F.3d 323, 331 (3d Cir. 2000) (citations omitted).

Here, it is uncontested that Palmisano has set forth a prima facie case. At all times Palmisano requested to be reinstated as Allentown branch manager, he was over forty years of age. He made several phone calls and wrote five letters requesting that he be reinstated as Allentown branch manager. Pl.'s Aff., Ex. 8, 9, 11, 15, 19; Pl.'s Dep. II at 36-37. In addition to managing other branches, Palmisano managed the Allentown branch for several years. To date Palmisano has been

denied reinstatement as Allentown branch manager while the branch manager responsibilities have been passed along to four different people. Lastly, all four replacements were at least nineteen years younger than Palmisano which is more than sufficient to permit an inference of age discrimination. See Barber v. CSX Distribution Services, 68 F.3d 694, 699 (3d Cir. 1995) (holding that an eight year difference was sufficient to establish a prima facie case).

By satisfying all four parts of the prima facie case, Palmisano raises a rebuttable presumption that Electrolux unlawfully discriminated on the basis of age. See St. Mary's Honor Center v.Hicks, 509 U.S. 502, 506 (1993), citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Electrolux can rebut this presumption by offering a legitimate nondiscriminatory reason for not reinstating Palmisano as Allentown branch manager. See Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). Because of the difficulties in ascertaining the true reasons and individual responsible for making a business decision, I must presume in employment discrimination cases that unexplained acts are based on impermissible factors. Sempier, 45 F.3d at 728, citing Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). Here, Electrolux contends that since the Allentown branch manager position was no longer in existence, Electrolux was unable to reinstate Palmisano to that position. Electrolux claims the position was phased out and that the responsibilities were carried out by division managers and sales managers. Luisi Dep. at 100-110.

As Electrolux has proffered a legitimate nondiscriminatory reason for its actions, Palmisano must now provide "some evidence from which a factfinder could reasonably conclude that the defendant's proffered reasons were fabricated." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Palmisano needs only suficient evidence to discredit Electrolux's proffered reason. Therefore, if the evidence used to establish the prima facie case is also sufficient to discredit the employer's

explanation, the defendant is not required to produce additional evidence of discrimination. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995) (citing Fuentes, 32 F.3d at 764). However, Palmisano's evidence of pretext must be relevant to the hiring process and suggest that the allegedly unfair employment practices at Electrolux were a result of his age. Narin, 206 F.3d at 331, 333.

There is evidence that the Allentown branch manager position was later restored and that despite Palmisano's repeated requests for the job it was given to another Electrolux employee. See Luisi Dep. at 105. In addition, the area vice president Richard Luisi allegedly made several defamatory age-related remarks including one about Palmisano being too old for the Allentown branch manager position. Vastardis Dep., Ex. 1; Vastardis Dep. at 22-23. Although it is unclear who made the decision or decisions not to reinstate Palmisano as Allentown branch manager, Luisi is a high-level company executive capable of effectuating a policy of age discrimination in regard to personnel that must answer to him. Therefore, ageist comments by Luisi have probative value as to the attitudes of Electrolux management in its hiring practices. See Ryder v. Westinghouse Electric Corporation, 128 F.3d 128, 132 (3d Cir. 1997). Based on the restoration of the Allentown branch manager position and the evidence of ageist remarks, there is ample evidence for a reasonable fact finder to conclude that Electrolux's stated reason is unworthy of belief. Accordingly, I will deny Electrolux's motion for summary judgment with respect to the ADEA discrimination claim..

V.

Palmisano has also alleged that Electrolux unlawfully retaliated against him by terminating his insurance coverage and later his employment at the company. In order for Palmisano "to establish a prima facie case of retaliation, [Palmisano] must show: (1) that he engaged in protected

conduct; (2) that he was subject to an adverse employment action subsequent to such activity; and (3) that a causal link exists between the protected activity and the adverse action." Barber, 68 F.3d at 701, citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989).

The record before me contains no evidence of the requisite causal link between his allegedly protected activities and the subsequent termination of his insurance coverage. Palmisano himself testified that sales personnel unlike management are required to meet a minimum amount of earnings to maintain coverage under the Electrolux Group Medical Plan. He chose to work as a sales representative and turned down management positions with full knowledge of that earnings requirement. Pl.'s Dep. II at 60-63. He has not provided any evidence of Electrolux waiving the minimum earnings requirement for other employees nor has he pointed to past instances where Electrolux waived the earnings requirement for him. As such, Palmisano has failed to provide evidence from which a reasonable fact finder could establish a causal connection between his filing of the EEOC charges and the termination of his health insurance.

With respect to Palmisano's employment at Electrolux, it was Palmisano who requested in a letter to Electrolux's chief executive officer that his employment be terminated. Pl.'s Aff., Ex. 19. Palmisano cannot submit what is effectively a letter of resignation and then claim that he suffered an adverse employment action when that "resignation" is accepted. For these reasons, I will grant judgment for Electrolux on the unlawful retaliation claims under the ADA and the ADEA.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK S. PALMISANO	:	CIVIL ACTION
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	:	
v.	:	
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	:	
ELECTROLUX LLC, f/k/a	:	
ELECTROLUX CORP.	:	NO. 99-426

O R D E R

AND NOW this day of August, 2000, upon consideration of the defendant's motion for summary judgment and plaintiff's response thereto, IT IS HEREBY ORDERED that defendant's motion is GRANTED IN PART and DENIED IN PART.

Judgment is entered in favor of defendant Electrolux LLC and against plaintiff Patrick S. Palmisano with respect to the unlawful discrimination and unlawful retaliation claims under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and the unlawful retaliation claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.

With respect to the unlawful discrimination claim under the Age Discrimination in Employment Act, the motion is DENIED.

THOMAS N. O'NEILL, JR. J.